Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 19____

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B&M FARMS, KEVIN F. BREWER,
and JoANN BREWER,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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# APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS TO APPENDIX

Memorandum of the Ninth Circuit Court of Appeals filed June 21, 1996 . . . . . A

Order denying Petition for Rehearing filed August 7, 1995 . . . . . B

Judgment in a Criminal Case as to B & M Farms filed April 6, 1995 . . . . . C

Judgment in a Criminal Case as to Kevin Brewer filed May 2, 1995 . . . . . D

Judgment in a Criminal Case as to Jo Ann Brewer filed April 6, 1995 . . . . . E

Indictment filed April 21, 1994, in the United States District Court . . . . . F

FILED
Jun 21 1996
Cathy A. Catterson, Clerk
U.S. Court of Appeals

**NOT FOR PUBLICATION**
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| United States of America,<br><br>Plaintiff-Appellee<br>and Cross-Appellant,<br><br>v.<br><br>B&M Farms,<br>Defendant-Appellant<br>and Cross-Appellee, | MEMORANDUM*<br><br>Nos. 95-30118,<br>95-30134<br><br>D.C.No. CR94-28-01-JDS |
| United States of America,<br><br>Plaintiff-Appellee<br>and Cross-Appellant,<br><br>v.<br><br>Jo Ann Brewer,<br><br>Defendant-Appellant<br>and Cross-Appellee, | <br><br>Nos. 95-30119,<br>95-30133<br><br>D.C.No. CR94-28-03-JDS |

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| United States of America, | ) | |
| | ) | |
| Plaintiff-Appellee and Cross-Appellant | ) | Nos. 95-30144, 95-30162 |
| | ) | |
| v. | ) | D.C. No.CR94-28-02-JDS |
| | ) | |
| Kevin F. Brewer, | ) | |
| | ) | |
| Defendant-Appellant and Cross-Appellee | ) | |

Appeal from the United States District Court
for the District of Montana

Jack D. Shanstrom, District Judge, Presiding

Argued and Submitted April 9, 1996
Seattle, Washington

Before: PREGERSON and TASHIMA, Circuit Judges, and JONES, District Judge.**

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Robert E. Jones, United States District Judge, District of Oregon, sitting by designation.

This case arises out of an alleged scheme to defraud the government of farm subsidies through use of a fictitious partnership. Defendants B&M Farms, Kevin F. Brewer, and Jo Ann Brewer (collectively "defendants") are a putative Montana partnership and two of its partners, who are husband and wife. A jury convicted all defendants of one count of mail fraud and two counts of federal program fraud. They appeal from their convictions and the government cross-appeals from their sentences.

We have jurisdiction to review the judgments of conviction under 28 U.S.C. § 1291, and the sentences under 18 U.S.C. § 3742. We affirm the convictions, but vacate defendants' sentences and remand for resentencing.

## FACTUAL AND PROCEDURAL BACKGROUND

Kevin F. Brewer and Jo Ann Brewer, husband and wife, have farmed in and around Forsyth, Montana since the mid-1950s. They now own extensive holdings of land in four Montana counties.

Farmers, such as the Brewers, are eligible for federal farm subsidy programs, including the Wheat and Feed Grain Program ("WFGP") and the Conservation Reserve Program ("CRP"). The United States Department of Agriculture's Agricultural Stabilization and Conservation Service ("ASCS") administers these programs. Payments under these programs are limited

to an annual maximum of $50,000 per program, per single farming entity.[1]

However, if a farm is operated as a general partnership, each partner may enable the partnership to increase its annual payment limits by an additional $50,000 under both programs. An ASCS official testified that, for a partnership to be eligible for the raised limits, its partners have to make "significant contributions" towards the partnership of (1) capital, land, or equipment; and (2) labor not compensated by wages. Management activity also "contributes" to the partnership.

Until 1986, the Brewers' farming business operated as a sole proprietorship, with the Brewers owning all land and equipment and exercising complete managerial control. In 1986, Kevin F. Brewer signed a partnership agreement with two of his sons, Steven and Kevin M., and two longtime employees, Michael McLeod and John MacLeod (unrelated). The agreement formed B&M Farms, a Montana partnership. The Brewers' employees became "partners" of B&M Farms by making a $1 capital contribution. Defendants then represented on annual payment limitation forms submitted to the ASCS that B&M Farms was an equal partnership with each partner contributing equal amounts

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[1] In 1991, spouses of participating farmers became eligible for an additional maximum of $50,000 per program.

of land, equipment, labor not compensated with wages, and management. Between 1986 and 1993, B&M Farms received hundreds of thousands of dollars a year in WFGP and CRP farm subsidies. B&M Farms received $264,011 for crop year 1990, $323,103 for 1991, $236,143 for 1992, and applied for $242,207 for 1993.

The partnership's roster changed somewhat over the years. In 1989, the Brewers' son, Kevin M., left B&M Farms. Each of the remaining four partners thereafter supposedly held a 25 percent interest. In 1990, Michael McLeod left the partnership after receiving $1 for his interest. Jo Ann Brewer replaced McLeod as the fourth partner.

In 1990, the county ASCS office selected B&M Farms for a discretionary year-end review, which raised certain eligibility questions. In response to an ASCS inquiry as to how Jo Ann Brewer acquired Michael McLeod's 25 percent interest in the partnership, the Brewers provided the ASCS review committee with a copy of a check to McLeod for $9,000. However, this money was in fact payment for 12 head of cattle.

A series of ASCS rulings and appeals regarding B&M Farms' eligibility followed the 1990 review. A state ASCS committee determined that B&M Farms should refund the government $137,888 in excess payments for crop year 1990. In a letter to the Brewers of December 20, 1991, the committee noted

that it did not consider partners paid with "wages" to be making "contributions" of labor.

Shortly thereafter, Jo Ann Brewer took the biweekly B&M Farms checks written to McLeod and MacLeod marked "wages" or "labor", used correction fluid to "white out" those entries on the memo line of the checks, and replaced the deleted words with "draw".

Because of the crop year 1990 issues, the local ASCS committee automatically audited B&M Farms for crop year 1991. In March 1992, the Brewers submitted photocopies of the altered checks to the local ASCS committee. The ASCS then approved B&M Farms' eligibility status for 1991 payments. Meanwhile, the Brewers continued to appeal the refund for crop year 1990. B&M Farms received farm payments based on increased eligibility for crop year 1992. However, an investigation by the Office of the Inspector General, which led to this prosecution, resulted in a denial of most payments for crop year 1993.

The government charged that defendants committed one count of mail fraud under 18 U.S.C. § 1341 by causing the mails to be used in a fraudulent acquisition of federal farm subsidies through a fictitious partnership. The government also charged defendants with two counts of federal program fraud under 18 U.S.C. § 1001 for (1) their representations of a fictitious partnership on the annual payment limitation forms, and (2) their submission of the altered checks.

At trial, evidence questioning the authenticity of the partnership focused on two of the B&M Farms partners, John MacLeod and Michael McLeod. Their testimony and that of McLeod's wife, Janice, established that: (1) they contributed no land or money (besides the $1) to the partnership; (2) they had no access to the partnership checking account; (3) they never received an accounting nor attended partnership meetings; (4) Kevin Brewer made the decisions himself as to how the partnership would pay the Brewers for the lease of land and equipment; (5) they never pledged their assets for the loans to B&M Farms, nor took part in the negotiations for those loans; (6) their responsibilities did not significantly increase as "partners"; and (7) they continued to receive the same compensation as "partners" as they had before as employees, although the salary increased over the years.

The jury convicted all defendants on all three counts. The district judge ordered restitution in the amount of $176,172 as a joint and several obligation of the co-defendants.[2] B&M Farms was sentenced to a term of five years probation, Jo Ann Brewer to a term of ten months home detention with electronic monitoring and three years probation, and Kevin F. Brewer to a 15-month term of imprisonment, followed by two years of supervised release. The court also fined B&M Farms

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[2] Jo Ann Brewer's joint and several restitution obligation with her codefendants is $150,050.

$2,800, Jo Ann Brewer $90,000, and Kevin F. Brewer $250,000.

## DISCUSSION

### I. Guilt issues

#### A. Sufficiency of the evidence under 18 U.S.C. § 1341.

Defendants contend the evidence at trial was insufficient for the jury to convict them of mail fraud.[3] There is sufficient evidence to support a conviction if, viewing the evidence in the light most favorable to the government, a rational trier of fact could find all elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); United States v. Vgeri, 51 F.3d 876, 879 (9th Cir. 1995).

Defendants annually represented on ASCS

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[3] The elements of mail fraud are: (1) defendant was part of a scheme or plan for obtaining money or property by making false promises or statements; (2) defendant knew the promises or statements were false when made; (3) the promises or statements were of a kind that would reasonably influence a person to part with money or property; (4) the defendant acted with the intent to defraud; and (5) defendant used or caused to be used the mail to carry out or attempt to carry out the scheme. See 18 U.S.C. § 1341.

payment limitation forms that B&M Farms was a partnership of equal interests. The evidence easily allowed the jury to infer that defendants made these representations with an intent to increase their eligibility for farm subsidies past the $50,000 limit. In fact, they succeeded in doing so for several years. A jury could find beyond a reasonable doubt from the testimony of John MacLeod, Michael McLeod, and Janice McLeod that B&M Farms has never been an equal partnership, or a partnership at all under Montana law.[4]

More importantly, a jury could also find beyond a reasonable doubt that defendants knew the reality of their business relationship failed the legal test for a partnership. Their representations that each partner's interest was equal was a blatant and knowing falsehood. This falsehood belies their argument to the jury that B&M Farms was a good-faith attempt to create a

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[4] In order for Montana law to recognize a partnership, the parties must intend to associate themselves as partners. Tondu v. Akerley, 885 P.2d 116, 196-97 (Mont. 1993). There must exist: (1) some contribution of each co-adventurer or partner of something promotive of the enterprise; (2) joint propriety interest and a right of mutual control over the subject matter of the enterprise or over the property engaged therein; and (3) agreement to share the profits. Id. The intent to form a partnership must be clearly manifested as ascertained from all the facts, circumstances, and conduct of the parties. Id.

partnership, albeit of unequal interests. The falsehood instead implies that the entire B&M Farms venture was an exercise in fiction from the outset.

A jury could therefore conclude beyond a reasonable doubt that defendants knowingly maintained a fictitious partnership to defraud the government of farm subsidies, and that in doing so defendants caused the mails to be used.[5]

**B. Sufficiency of the evidence under 18 U.S.C. § 1001.**

Defendants contend the evidence at trial was insufficient for a jury to convict them on two counts of federal program fraud.[6]

The first count of federal program fraud relates to the payment limitation forms submitted by defendants.

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[5] Trial testimony proved that the ASCS mailed the farm program checks to recipients. With no evidence to the contrary, the jury could reasonably assume the ASCS had followed its usual practice.

[6] The elements of federal program fraud are: (1) defendant made a false statement to a government agency; (2) defendant knew the statement was false when made; (3) defendant acted knowingly and willfully; and (4) the statements were material to the government agency's activities or decisions. See 18 U.S.C. § 1001.

Defendants represented on forms submitted to the ASCS that B&M Farms was an equal partnership, and this representation was false. Defendants knew these statements were false. Defendants made the statements knowingly and willfully on a subsidies application form signed by all the "partners". The statements were material to the ASCS's decision, because they related directly to B&M Farms' eligibility for subsidies exceeding the $50,000 limit.

The second count of federal program fraud arises from the doctored checks submitted to the local ASCS committee for the 1991 year-end review. As discussed, a jury could find beyond a reasonable doubt that B&M Farms was a fictitious partnership and defendants knew it. The modified checks would then be knowing misrepresentations of the nature of the employees' compensation. A jury could find beyond a reasonable doubt that defendants willfully submitted the falsified checks to achieve a favorable (but illegal) result if the ASCS audited B&M Farms again.

The evidence was therefore sufficient for a jury to convict defendants on both counts of federal program fraud.

**C. Denial of defendants' offered jury instruction**

Defendants contend that the district court's refusal to instruct the jury with an offered instruction was

reversible error. Defendants' offered instruction had two parts: (1) that the government had the burden of proving that B&M Farms was a fictitious partnership beyond a reasonable doubt, and (2) that good faith is a sufficient defense to conviction.

We review de novo whether the district court's instruction adequately presented the defendant's theory of the case. United States v. Duran, 59 F.3d 939, 94` (9th Cir.), cert. denied, 116 S.Ct. 525 (1995). If the district court's instructions fairly and adequately cover the elements of the offense, the panel reviews the instruction's precise formulation for an abuse of discretion. United States v. Woodley, 9 F.3d 774, 780 (9th Cir. 1993). A good faith instruction is unnecessary where the court has already adequately instructed the jury as to specific intent. Duran, 59 F.3d at 941.

Here, the district court instructed that the government must prove beyond a reasonable doubt the element of falsity of the defendants' representations. This instruction fairly and adequately conveyed that the government had to prove beyond a reasonable doubt that the partnership was fictitious. Moreover, the district court's instruction on specific intent obviated the need for further instruction on the good faith defense.

The district court properly instructed the jury in this case.

**D. Denial of motion to communicate with**

**alternate juror.**

Defendants contend the district judge erred in denying their motion to communicate with a dismissed alternate juror about allegations of juror misconduct.

We are unable to find a case directly on point for a standard of review for this motion. However, we review a denial of a motion for an evidentiary hearing regarding allegations of jury misconduct for abuse of discretion. United States v. Navarro-Garcia, 926 F.2d 818, 822 (9th Cir. 1991). "Unless the court is able to determine without a hearing that the allegations are without credibility or that the allegations if true would not warrant a new trial, an evidentiary hearing must be held." Id.

Here, the misconduct alleged is that jurors had already determined defendants' guilt before the judge submitted the case to them for deliberations.[7] However, the allegation made to the district court was fifth-hand hearsay. Thus, the allegation was so attenuated and lacking in credibility that the district court did not abuse its discretion in denying the motion.

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[7] If true, the jury's premature discussion of the case would warrant a determination "whether or not the misconduct has prejudiced the defendant to the extent that he has not received a fair trial." United States v. Klee, 494 F.2d 394, 396 (9th Cir.), cert. denied, 419 U.S. 835 (1974).

## II. Sentencing Issues

We review de novo the district court's interpretation and application of the guidelines. United States v. Basinger, 60 F.3d 1400, 1409 (9th Cir. 1995). The district court's factual findings underlying its application of the guidelines are reviewed for clear error. Id.

### A. Calculation of "loss"

Both defendants and the government assign error to the district court's determination of loss pursuant to U.S.S.G. § 2F1.1.

The district court's method for calculating loss appears to have: (1) totalled the payments B&M Farms received from each of the years 1990, 1991, and 1992 in which a defendant participated; [8] (2) then applied deductions of $50,000 per program per year of Kevin Brewer's and Jo Ann Brewer's participation, thus subtracting what the Brewers would have been eligible to receive in the absence of a partnership; and (3) then

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[8] The district court only used 1991 and 1992 for Jo Ann Brewer, because it found she joined the partnership in 1991. In its brief on cross-appeal, the government failed to assign error to this specific decision. The government therefore waived the objection it made to this decision at oral argument.

given B&M Farms another deduction for $137,888 repaid to the government for crop year 1990.

The district court determined the loss from Jo Ann Brewer's part in the scheme to be $150,050, from B&M Farms' to be $176,172, and from Kevin Brewer's to be $314,061. Defendants contend the loss from each defendant was zero. The government contends the loss from each defendant was far greater than determined. The parties differ over three subissues.

1. Crop years 1990 and 1993

The district court utilized the years 1990, 1991, and 1992 for calculation of loss. Defendants argue the appropriate years are 1991, 1992, and 1993, because 1990 falls outside the period used in the indictment. The government argues the appropriate years are 1990, 1991, 1992, and 1993, because these years encompass intended losses and related, albeit uncharged, losses that the guidelines expressly include.

The calculation of loss under the guidelines is not limited to the conduct charged in the indictment, and encompasses "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction." United States v. Scarano, 975 F.2d 580, 584 (9th Cir. 1992) (quoting U.S.S.G. § 1B1.3(a)(2)). Calculation of loss is not limited to actual loss, and includes all intended loss the defendant attempted to inflict. United States v. Joetzki,

952 F.2d 1090, 1096 (9th Cir. 1991); U.S.S.G. § 2F1.1 Application Note 7.

In 1990, B&M Farms applied for and received farm subsidies based on the fraudulently-inflated eligibility. We find the district court correctly included conduct from 1990 as part of the same scheme as charged in the indictment. In 1993, B&M Farms applied for excess subsidies, but received none. We find the district court clearly erred in omitting from its calculation the intended loss from conduct in 1993.

2. Credit for repayment of $137,888

The district appears, inexplicably, to have given B&M Farms, but not Kevin Brewer, $137,888 credit for the repayment to the government for crop year 1990. Defendants claim they are entitled to this credit in the loss calculation.

No such credit should be given to any defendant in this case, because defendants intended to inflict the loss of the refunded money. See Joetzki, 952 F.2d at 1096. Only the ASCS's discretionary review process prevented them from doing so.

3. Deduction for Steve Brewer's eligibility

Defendants seek an additional annual $50,000 per-

program deduction from the calculation of loss based on the partnership eligibility of Steven Brewer.

At a pre-sentencing hearing, Steven Brewer and a local ASCS official gave testimony on Steven's eligibility for farm subsidies in his own right prior to becoming a "partner" of B&M Farms in 1986. With a $100,000 bank note secured by his father, Steven had leased land and equipment for farming and had received farm subsidies with his own annual $50,000 limit. After 1986, Steven subleased this land to B&M Farms and stopped receiving subsidy payments in his own right. The ASCS official testified that Steven was not actually eligible for the pre-1986 payments he received, because of the nature of his borrowed capital and leased land. The ASCS official also stated B&M Farms had in fact paid Steven wages (and not draws) for his farm labor, consistent with those paid to John MacLeod and Michael McLeod. Consequently, the official concluded Steven's contributions to B&M Farms were insufficient to create increased eligibility for farm subsidies.

Given this evidence, the district court's denial of additional deductions based on Steven's participation was not clearly erroneous.

**B. Assessment for "more than minimal planning"**

On cross-appeal, the government contends that the district court's finding that defendants had not engaged

in "more than minimal planning" was clearly erroneous. "More than minimal planning" results in a two-level enhancement in crimes of fraud. U.S.C.G. § 2F1.1(b)(2). The term is clearly defined in the guidelines:

> "More that minimal planning" means more planning than is typical for commission of the offense in a simple form. "More than minimal planning" also exists if significant affirmative steps were taken to conceal the offense . . . . "More than minimal planning" is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune. Consequently, this adjustment will apply especially frequently in property offenses.

U.S.S.G. § 1B1.1 Application Note 1(f). Citing this comment, appellate courts have reversed trial court findings of no "more than minimal planning" as clearly erroneous where fraudulent acts occurred repeatedly over an extended period of time. See United States v. Monaco, 23 F.3d 793, 796-98 (3rd Cir. 1994); United States v. Ivery, 999 F.2d 1043 (6th Cir. 1993); United States v. Rust, 976 F.2d 55, 57 (1st Cir. 1991).

More than minimal planning enhancements are appropriate where defendants create phony business entities to perpetrate their fraud, see Ivery, 999 F.2d at 1046, where false business documents are created and

uttered, see United States v. Donine, 985 F.2d 463, 467 (9th Cir. 1993), where sophisticated financial arrangements are used, see United States v. Ford, 989 F.2d 347, 351 (9th Cir. 1993), and where defendants enlist accomplices. See United States v. Woody, 55 F.3d 1257, 1274 (7th Cir.), cert. denied, 116 S.Ct. 234 (1995).

Here, the evidence demonstrates that Kevin Brewer created a fictitious business entity in 1986 by way of a bogus partnership agreement and enlisted as accomplices his sons, wife, and two employees. Together, Jo Ann and Kevin Brewer annually submitted false documents to the ASCS, used lease agreements to funnel back fraudulently-acquired funds, and falsified checks in furtherance of their fraud (and also to conceal it). This conduct persisted over a period of years.

The district court clearly erred in not finding more than minimal planning.

**C. Downward adjustment for Jo Ann Brewer's minor rule**

Jo Ann Brewer contends that the district court clearly erred in denying her a two-level downward adjustment for minor participant status under U.S.S.G. § 3B1.2(b).

To merit a reduction in offense level as a minor participant, a defendant should be one who is less

culpable than most other participants, but whose role could not be described as minimal. United States v. Benitez, 34 F.3d 1489, 1497 (9th Cir. 1994), cert. denied, 115 S.Ct. 1268 (1995). The defendant must be substantially less culpable than her average coparticipant. Id. at 1497-98.

In arguing the district court here committed clear error, Jo Ann Brewer relies on the findings the district court made in departing down one level because of her "following role" in the scheme. The district court stated at a sentencing hearing:

> I have departed downward based on the fact I do not hold her to the same accountability that I hold the partnership and Kevin Brewer; that she joined the partnership late . . . and I do not put her in the planning of the partnership to that extent.

In the sentencing order, the district court elaborated:

> In this particular case, it appears the guideline range overestimates the seriousness of the offense when weighed against government procedures and the actual conduct of this defendant. First of all, the defendant has demonstrated her primary role at B&M Farms was to pay all the bills, order supplies, take care of

> various money matters and other miscellaneous work. She did submit to ASCS that she was a bonafide member of the alleged partnership. Nevertheless, she did not generate at the beginning of the partnership planning. She followed the plan as agreed by the partners as a full participant in the offense conduct, but did not provide the genesis for the overall plan or activity . . . . In essence, she played more of a "following role" than a dynamic brainstorming participant.

Judgment of April 6, 1995.

Strictly speaking, the district court's observations do not amount to a finding that Jo Ann was a "minor participant." Furthermore, the facts of the case make such an interpretation implausible. While less involved in the fraud than her husband, Jo Ann was much more involved than her two sons and the two farm employees who joined as "partners". From the beginning, Jo Ann effected the transactions that funnelled the profits from B&M Farms to her and her husband. Jo Ann altered the employee paychecks. Jo Ann bought a 25 percent interest in B&M Farms from Michael McLeod for $1, and then showed the ASCS a $9,000 check from the purchase of McLeod's cows to fake a substantial investment in that 25 percent interest. Jo Ann benefited from the fraud to an extent MacLeod and McLeod never did.

The district court did not commit clear error in denying Jo Ann Brewer minor-participant status.

**D. Downward departure of one level for Jo Ann Brewer**

On cross-appeal, the government contends the district court improperly departed downward from the adjusted guideline level in sentencing Jo Ann Brewer.

Our review of guideline departures follows the three-part procedure established in United States v. Lira-Barraza, 941 F.2d 745, 746-47 (9th Cir. 1991) (en banc). We review: (1) whether the trial court had the legal authority to depart, de novo; (2) the factual findings in support of the basis for departure, for clear error; and (3) the "reasonableness" of the extent of departure in light of the structure, standards, and policies of the guidelines. Id. A trial court must explain the reasoning for departure in language sufficiently specific to allow meaningful review. Id. at 751.

Here, the district court did not use the minor-participant mechanism as the legal basis for departure, but rather U.S.S.G. § 5K2, which permits discretionary departure if a court finds unusual mitigating circumstances of a kind or to a degree not adequately taken into consideration by the Sentencing Commission. Jo Ann Brewer suggests an additional basis in § 2F1.1

Application Note 10(f), which allows downward departure in extraordinary cases where the calculation of loss overstates the seriousness of the offense. The loopholes of §§ 2F1.1 and 5K2 are purposely open-ended, factually.

Here, the district court gave a lengthy explanation of its reasons for departing downward, i.e., the unique role Jo Ann Brewer had in the fraud generated by her husband. None of the cases the government cites squarely negates the applicability of §§ 2F1.1 and 5K2 to these facts.[9] By basing the departure on the "following role" Jo Ann Brewer played, the district court may have bent the guidelines, but did not clearly break them. The district court's factual findings that Jo Ann Brewer played a less culpable, "following" role are not clearly erroneous. Finally, a one-level departure is minimal and therefore reasonable.

We affirm the downward departure.

**E. Fines Imposed**

Defendants Kevin Brewer and Jo Ann Brewer

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[9] The government cites United States v. Schein, 31 F.3d 135 (3rd Cir. 1994), which reversed the district court's downward departure based on its conclusory observation that the sentence required by the guidelines overstated the seriousness of the offense committed by the defendant in that case. See id. at 138.

contend the district court erred in imposing fines exceeding the limits set out in the fine table at U.S.S.G. § 5E1.2.

The district court must already recalculate defendants' guideline offense levels based upon our conclusions regarding calculation of loss and more-than-minimal planning. The fine ranges set out in § 5E1.2 are based on adjusted offense level. Therefore, we vacate defendants' fines and leave for the district court on remand the proper application of the Federal Sentencing Guidelines' fine provisions.

## CONCLUSION

We affirm defendants' conviction, but vacate their sentences and remand these cases to the district court for resentencing consistent with our conclusions regarding determination of loss, more than minimal planning, and fines.

**AFFIRMED** in part; **REVERSED** in part and **REMANDED**

FILED
Aug 7 1996
Cathy A. Catterson, Clerk
U.S. Court of Appeals

**NOT FOR PUBLICATION**
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| United States of America, | ) | ORDER |
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| Plaintiff-Appellee and Cross-Appellant, | ) | Nos. 95-30118, 95-30134 |
| | ) | |
| v. | ) | D.C.No. CR94-28-01-JDS |
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| B&M Farms, | ) | |
| Defendant-Appellant and Cross-Appellee, | ) | |
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| United States of America, | ) | |
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| Plaintiff-Appellee and Cross-Appellant, | ) | Nos. 95-30119, 95-30133 |
| | ) | |
| v. | ) | D.C.No. CR94-28-03-JDS |
| | ) | |
| Jo Ann Brewer, | ) | |
| | ) | |
| Defendant-Appellant and Cross-Appellee, | ) | |

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| United States of America, | ) | |
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| v. | ) | D.C. No. CR94-28-02-JDS |
| | ) | |
| Kevin F. Brewer, | ) | |
| | ) | |
| Defendant-Appellant and Cross-Appellee | ) | |

Before: PREGERSON and TASHIMA, Circuit Judges, and JONES, District Judge*

*The Honorable Robert E. Jones, United States District Judge, District of Oregon, sitting by designation.

The panel has voted to deny the petition for rehearing. Judges Pregerson and Tashima have voted to reject the suggestion for rehearing en banc, and Judge Jones so recommends.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FILED
Apr 6 1995
Lou Aleksich, Jr., Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

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| United States of America, | ) | CR 94-28-BLG-JDS-01 |
| | ) | **Judgment in a Criminal** |
| Plaintiff | ) | **Case** |
| | ) | (For Offenses Committed |
| v. | ) | On or After November 1, |
| | ) | 1987) |
| B & M Farms | ) | |
| | ) | Jay Lansing, |
| Defendant. | ) | Defendant's Attorney |

THE DEFENDANT:
was found guilty on counts I, II and III after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such counts, which involve the following offenses:

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|
| 18:1341 | Mail fraud | 4-16-92 | I |
| 18:1001 | Agricultural program fraud | 5-07-93 | II |

| | | | |
|---|---|---|---|
| 18:1001 | Agricultural program fraud | 5-05-92 | III |

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay a special assessment of $600.00, for counts I, II and III, which shall be due immediately.

It is further ordered that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: N/A
Defendant's Date of Birth: N/A
Defendant's Mailing Address:
HC 84, Box 3006
Forsyth, MT 59327

March 31, 1995
Date of Imposition of Sentence

s/ Jack D. Shanstrom
Jack D. Shanstrom
U.S. District Judge

April 6, 1995

## PROBATION

The defendant is hereby placed on probation for a term of five years.

While on probation, the defendant shall not commit another Federal, state, or local crime, shall not illegally possess a controlled substance, and shall not possess a firearm or destructive device. The defendant also shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution. . The defendant shall comply with the following additional conditions:

1. Defendant shall make periodic submissions to the Court or the probation officer at intervals specified by the Court, reporting the partnership's financial condition and results of business operations.

### Standard Conditions of Supervision

While the defendant is on probation pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as

directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted

permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

**Fine**

The defendant shall pay a fine of $2,800.00. The fine includes any costs of incarceration and/or supervision.

This count is the total of the fines imposed on individual counts as follows:

Count I - $933.33
Count II - $933.33
Count III - $933.34

The court has determined the defendant does not have the ability to pay interest. It is ordered that:

The interest is waived.

This fine plus any interest required shall be paid: in installments according to the following schedule of payments: As determined by the probation officer.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

**Restitution and Forfeiture**
**Restitution**

The defendant shall make restitution to the following persons in the following amounts:

| Name of Payee | Amount of Restitution |
|---|---|
| U.S. Department of Agriculture | $176,172.00 |

Payments of restitution are to be made to:
the United States Attorney for transfer to the payee(s).

Restitution shall be paid in installments according to the following schedule of payments: As determined by the probation officer.

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

**Statement of Reasons**

The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): Paragraph 26 of the presentence report added 2 points for more than minimal planning. The Court finds these two additional points are not appropriate. Paragraph 27 of the presentence report found the specific offense characteristic level to be nine (9) due to the monetary amount of fraud. The Court finds the fraud exceeded $120,000; therefore, the appropriate specific offense characteristic level should be seven (7)

**Guideline Range Determined by the Court:**

Total Offense Level: 13
Criminal History Category: N/A
Imprisonment Range: N/A
Supervised Release Range: N/A
Fine Range: $370,097 to $540,194
Restitution: $176,172.00

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no

reason to depart from the sentence called for by application of the guidelines.

FILED
May 2 1995
Lou Aleksich, Jr., Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

| | | |
|---|---|---|
| United States of America, | ) | 1:94CR00028-002 |
| | ) | **Judgment in a Criminal** |
| Plaintiff | ) | **Case** |
| | ) | (For Offenses Committed |
| v. | ) | On or After November 1, |
| | ) | 1987) |
| Kevin Brewer | ) | |
| | ) | Jay Lansing, |
| Defendant. | ) | Defendant's Attorney |

THE DEFENDANT:
was found guilty on counts 1, 2, 3 after a plea of not guilty.

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|
| 18:1341 | Mail fraud | 04-16-1992 | 1 |
| 18:1001 | Agricultural program fraud | 05-07-1993 | 2 |
| 18:1001 | Agricultural program fraud | 05-05-1992 | 3 |

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 516-38-4024
Defendant's Date of Birth: 4-28-35
Defendant's Mailing Address:
HC 84, Box 3006
Forsyth, MT 59327

April 14, 1995
Date of Imposition of Sentence

s/ Jack D. Shanstrom
Jack D. Shanstrom
U.S. District Judge

April 25, 1995

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 15 months on each count, to run concurrent.

The defendant shall surrender to the United States Marshal for this district.

Defendant is released on bond pending appeal. No surrender or designation until following appeal process.

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 2 years. This consists of two years on each count, to run concurrent. The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime.

While on supervised release, the defendant shall not illegally possess a controlled substance.

While on supervised release, the defendant shall not possess a firearm or destructive device. This condition shall remain in effect after the period of supervised release and until defendant is granted relief by a delegate of the Sec. of Treasury.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release

that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Financial Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the following additional conditions: See attached sheet.

**Standard Conditions of Supervision**

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant shall also comply with the following special conditions of supervised release:

Defendant shall not be eligible for federal programs while on supervised release.

**Financial Penalties**

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set out below.

| Count | Assessment | Fine | Restitution |
|---|---|---|---|
| 1 | $50.00 | $250,000 (cc with 2&3) | $176,172.22 (cc with 2&3) |
| 2 | $50.00 | $250,000 (cc with 2&3) | $176,172.22 (cc with 2&3) |
| 3 | $50.00 | $250,000 (cc with 2&3) | $176,172.22 (cc with 2&3) |
| Totals: | $150.00 | $250,000 | $176,172.22 |

**Restitution**

The defendant shall make restitution to the following persons in the following amounts:

| Name of Payee | Amount of Restitution |
|---|---|
| U.S. Department of Agriculture | $176,172.00 |

Defendant is jointly and severally liable for this restitution with codefendants Joann Brewer and B & M Farms.

Each restitution payment shall be divided proportionately among the payees named unless specified in the priority payment column above.

**Schedule of Payments**

Payment shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

The total fine and other monetary penalties shall be due as follows:

In installments to commence 30 days after the date of this judgment. If this judgment imposes a period of incarceration, payment shall be due during the period of incarceration. During a period of probation

or supervised release supervision payment of any unpaid balance shall be a condition of supervision and the U.S. Probation officer shall establish and may periodically modify the payment schedule provided that the entire financial penalty is paid no later than the termination of supervision but in no event no later than 5 years after release from incarceration.

All financial penalty payments are to be made to the Clerk of Court, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

**Statement of Reasons**

The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): The fine imposed is the statutory fine allowance. The statutory fine is appropriate due to the defendant's ability to pay and the seriousness of this offense.

**Guideline Range Determined by the Court:**

Total Offense Level: 14
Criminal History Category: I
Imprisonment Range: 15 to 21 months
Supervised Release Range: 0 to 2 years
Fine Range: $4,000 to $40,000
Restitution: $176,172.22

The sentence is within the guideline range, that range

does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

FILED
Apr 6 1995
Lou Aleksich, Jr., Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

| | | |
|---|---|---|
| United States of America, | ) | CR 94-28-BLG-JDS-03 |
| | ) | **Judgment in a Criminal** |
| Plaintiff | ) | **Case** |
| | ) | (For Offenses Committed |
| v. | ) | On or After November 1, |
| | ) | 1987) |
| Joann Brewer | ) | |
| | ) | Jay Lansing, |
| Defendant. | ) | Defendant's Attorney |

THE DEFENDANT:
was found guilty on counts I, II and III after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such counts, which involve the following offenses:

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|
| 18:1341 | Mail fraud | 4-16-92 | I |
| 18:1001 | Agricultural program fraud | 5-07-93 | II |

| | | | |
|---|---|---|---|
| 18:1001 | Agricultural program fraud | 5-05-92 | III |

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay a special assessment of $150.00, for counts I, II and III, which shall be due immediately.

It is further ordered that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 532-34-6420
Defendant's Date of Birth: 3-15-38
Defendant's Mailing Address:
HC 84, Box 3006
Forsyth, MT 59327

March 31, 1995
Date of Imposition of Sentence

s/ Jack D. Shanstrom
Jack D. Shanstrom
U.S. District Judge

April 6, 1995

## PROBATION

The defendant is hereby placed on probation for a term of three years.

While on probation, the defendant shall not commit another Federal, state, or local crime, shall not illegally possess a controlled substance, and shall not possess a firearm or destructive device. The defendant also shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution. The defendant shall comply with the following additional conditions:

1. Defendant shall be placed on electronic monitoring for 10 months with all costs to be paid by defendant.

2. Defendant shall be prohibited from owning, using, or possessing a firearm or other dangerous weapon, while on probation and thereafter unless granted relief by the delegate of the Secretary of Treasury.

### Standard Conditions of Supervision

While the defendant is on probation pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

**Fine**

The defendant shall pay a fine of $90,000.00. In addition, defendant must pay the costs of the electronic monitoring ordered by the Court.

This count is the total of the fines imposed on individual counts as follows:

Count I - $30,000
Count II - $30,000
Count III - $30,000

This fine plus any interest required shall be paid: in installments according to the following schedule of payments: As determined by the probation officer.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

**Restitution and Forfeiture**
**Restitution**

The defendant shall make restitution to the following persons in the following amounts:

| Name of Payee | Amount of Restitution |
|---|---|
| U.S. Department of Agriculture | $150,050.00 |

This defendant is to be held jointly and severally liable for the restitution amount with co-defendants Kevin Brewer and B & M Farms.

Payments of restitution are to be made to:

the United States Attorney for transfer to the payee(s).

Restitution shall be paid in installments according to the following schedule of payments: As determined by the probation officer.

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

**Statement of Reasons**

The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): See two page attachment.

**Guideline Range Determined by the Court:**

Total Offense Level: 12
Criminal History Category: I
Imprisonment Range: 10 to 16 months
Supervised Release Range: 2 to 3 years
Fine Range: $3,000 to $30,000
Restitution: $150,050.00

The sentence departs from the guideline range for the following reason(s): See two page attachment.

**Downward Departure Factors Regarding**
**United States vs. Jo Ann Brewer,**
**CR 94-38-BLG-JDS-03**

According to USSG Section 5K2.0, pursuant to 18 USC 3553(b), the sentencing Court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described . . . . the controlling decision as to whether and to what extent departure is warranted can only by [sic] made by the courts."

It is determined by the court that the following factors constitute mitigating circumstances for consideration of a departure below the prescribed guideline range, pursuant to USSG 5K2.0:

In this particular case, it appears the guideline range overestimates the seriousness of this offense when weighed against governmental procedures and the actual conduct of this defendant. First of all, the defendant has demonstrated her primary role at B&M farms [sic] was to pay all the bills, order supplies, take care of various money matters and other miscellaneous work. She did submit to ASCS that she was a bonafide member of the alleged partnership. Nevertheless, she did not generate the beginning of the partnership

planning. She followed the plan as agreed by the partners as a full participant in the offense conduct, but did not provide the genesis for the overall plan or activity. This was directed more prominently by her husband, Kevin Brewer. In essence, she played more of a "following role" than a dynamic brainstorming participant.

Another significant feature of this case was the role the government provided in the continuance of this offense. For instance, all of the payments paid to B&M Farms were "approved" by the ASCS after the partnership applications were submitted. The defendant could then conceivably believe that their application was legitimate because of this "approval." ASCS did not investigate the partnership for it's [sic] legitimacy before granting payments for the ARP and CRP programs. B&M Farms was subject to investigation at any time by ASCS, and did not attempt to conceal their activities to fool the government. The defendant submitted applications from 1991 to 1992 which the jury found to be fraudulent, but such activity falls short of being clandestine by nature and therefore overestimated by guideline calculations. In essence, the defendant did not realize the severity of the governmental position in this case, although she is obligated to know CSRS rules. She did not commit this offense with explicit malice or disregard. Because of this, the court views this circumstance as a mitigating factor not contemplated by the sentencing guidelines.

Based upon the above noted factors, it is believed a departure is warranted in this case. It is determined that a departure of at least one level is appropriate from level 13 to level 12, criminal history category I, which would reduce the sentencing imprisonment range from 12-18 months to 10-16 months. Pursuant to USSG 5E1.2, the guideline fine range would remain the same at $3,000 to $30,000.

Carl E. Rostad
Assistant U.S. Attorney
P. O. Box 3447
Great Falls, Montana 59403
Telephone: 406/761-7715
Attorney for the United States

FILED
94 Apr 21
Lou Aleksich, Jr., Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

| | | |
|---|---|---|
| United States of America, | ) | CR 94-28-BLG-JDS |
| | ) | |
| Plaintiff | ) | Title 18 U.S.C. § 1341 |
| | ) | MAIL FRAUD |
| v. | ) | (Penalty: 5 years |
| | ) | imprisonment |
| B&M Farms, Kevin F. | ) | and/or $250,000 fine) |
| Brewer, and Joann Brewer | ) | Title 18 U.S.C. § 1001 |
| | ) | Agricultural Program |
| Defendants. | ) | Fraud (Penalty: 5 years imprisonment and/or $250,000 fine) |

INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

MAIL FRAUD

A. INTRODUCTION

1. Beginning on or before the 1st day of

March, 1986, and continuing thereafter until on or about the 16th day of April, 1992, at Forsyth, KEVIN F. BREWER, devised an inflated billing scheme to obtain money by creating a fictitious partnership, the fraudulent entity designed to obtain money from the Conservation Reserve Program (CRP), and the Wheat and Feed Grain Program (WFGP) in an amount in excess of $50,000, that amount being the maximum amount under the agricultural programs limitation for a single operator.

2. From or before March of 1986, the defendant, KEVIN F. BREWER, owned and operated a grain and livestock producing enterprise near Forsyth, Montana.

3. In March of 1986, KEVIN F. BREWER created a "partnership", B & M Farms, which was designed to evade the $50,000 program limitation by falsely representing that his son, Kevin M. Brewer, a dentist practicing in Billings, Montana, and two employees, John M. MacLeod and Michael McLeod, were *bona fide* partners in B & M Farms, thereby forming an entity entitled to participation in farm programs in an amount equal to $400,000 to $500,000 per year of operation.

**B. Purpose of the Sham Partnership Scheme**

From on or before May of 1991, and continuing thereafter until on or about the 7th day of May, 1993, at Forsyth, Montana, in the State and District of

Montana, and other places:

B & M Farms, Kevin F. Brewer, and Joann Brewer

devised a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises, that is, to circumvent the restrictions and limitations placed upon the Conservation Reserve Program (CRP), and the Wheat and Feed Grain Program (WFGP) by creating a fictitious shell partnership which included KEVIN F. BREWER, a son, Steven R. Brewer, a convenience store operator, another son, Kevin M. Brewer, a dentist, and two farm employees, later JOANN BREWER.

## C. The Scheme

It was part of the scheme and artifice that the defendants, B & M FARMS and KEVIN F. BREWER, would apply for participation on the Conservation Reserve Program (CRP) and Wheat and Feed Grain Program (WFGP) as B & M Farms, falsely representing that the partnership included four to five partners eligible for $50,000 per partner, when in truth and in fact, no partnership existed and certain "partners" did not contribute land, labor (except that reimbursed by wages) or capital, and the "partnership" existed primarily, if not exclusively, to allow the defendants the opportunity to obtain government payments in excess of the limitation for a single operator.

**D. Mail Communication**

That from on or about May of 1991, and continuing thereafter to on or about the 7th day of May, 1993, the defendants:

B & M Farms, Kevin F. Brewer, and Joann Brewer

for the purpose of executing the scheme and artifice to defraud, did take or receive from the United States Mail, delivered by the United States Postal Service, letters or other mail matter, that is, payments to B & M Farms from the Conservation Reserve Program (CRP) and Wheat and Feed Grain Program (WFGP), from the United States Department of Agriculture based upon the participation and active management of all partners named in the program applications for the years 1990 through May of 1993.

All in violation of Title 18 U.S.C. § 1341.

COUNT II
AGRICULTURAL PROGRAM FRAUD

Between on or about May of 1991, and continuing thereafter until on or about the 7th day of May, 1993, at Forsyth, in the State and District of Montana, and other places, the defendants:

B & M Farms, Kevin F. Brewer, and Joann Brewer

in a matter within the jurisdiction of the Department of Agriculture, a department or agency of the United States, did knowingly and willfully make false, fictitious or fraudulent statements or representations or use false writings or documents knowing the same to contain false, fictitious or fraudulent statements, in that, the defendant, KEVIN F. BREWER, in applications for participation in the Conservation Reserve Program (CRP) and Wheat and Feed Grain Program (WFGP) on behalf of B & M Farms represented that the partnership was entitled to payments based upon the active participation of four to five partners, when in truth and in fact, as B & M FARMS, KEVIN F. BREWER and JOANN BREWER then and there well knew, not all of the partners named were partners in the farming operation entitled to share in the profits or required to contribute land, capital or labor (other than that labor for which wages would be paid), in violation of Title 18 U.S.C. § 1001.

COUNT III
AGRICULTURAL PROGRAM FRAUD

That on or about the 5th day of May, 1992, at Forsyth, in the State and District of Montana, the defendants:

B & M Farms, Kevin F. Brewer, and Joann Brewer,

in a matter within the jurisdiction of the Department of

Agriculture, a department or agency of the United States, did knowingly and willfully make or use false writings or documents, knowing the same to contain false, fictitious or fraudulent statements or entries, that is, when questioned regarding the nature of the alleged partnership, B & M FARMS, KEVIN F. BREWER and JOANN BREWER submitted checks written on the B & M FARMS checking account indicating that payments made to the partners were partnership "draws", when in truth and in fact, as KEVIN F. BREWER then and there well knew, the payments were for wages and did not represent the payee's receipt of income from the partnership venture, in violation of Title 18 U.S.C. § 1001.

A TRUE BILL.

s/JoAn Duncan
FOREPERSON

s/Sherry Scheel Matteucci
SHERRY SCHEEL MATTEUCCI
United States Attorney